STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hoekstra, Griffin and Borello, JJ.

MARCIA VAN TIL,
Plaintiff-Appellant,

vs.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC.,
Defendant-Appellee,

No. 128283

Court of Appeals
No. 250539

Ottawa Circuit
No. 02-042717-NO

BRIEF ON APPEAL

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JAN 17 2006
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Contents

INDEX OF AUTHORITIES

Statutes

Court Rules

BASIS OF APPELLATE JURISDICTION

This Court granted leave to appeal on November 3, 2005.

QUESTION INVOLVED

IN A CIVIL CASE, MAY A TRIAL COURT DETERMINE WHETHER THE FACTUAL BASIS FOR ITS JURISDICTION EXISTS, WHEN ITS JURISDICTION DEPENDS UPON WHETHER THE PLAINTIFF WAS AN EMPLOYEE OF THE DEFENDANT?

Plaintiff-Appellee says:	YES
Defendant-Appellant says:	YES
The Trial Court said:	YES
The Court of Appeals said:	YES
Amicus Curiae says:	YES

STATEMENT OF FACTS

Note: for the following statement of facts, Amicus Curiae relies upon the statement in the opinion of the Court of Appeals.

Plaintiff-Appellant Marcia Van Til was helping her husband remove wax from a mailroom floor. Her husband was an employee of Defendant-Appellee Environmental Resources Management, Inc. (ERM). She suffered injuries to the skin on her legs, caused by the chemicals used to remove the wax.

Plaintiff sued, alleging that Defendant had a duty to warn her of the danger presented by the chemicals. Defendant ERM moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that Plaintiff was its employee and suit was barred by the exclusive remedy provision of the Worker Disability Compensation Act, MCL 418.131 et seq.

The trial court denied ERM's motion, holding that Plaintiff was a gratuitous worker and not an employee. ERM then moved for reconsideration, arguing that it was a "statutory employer," because her husband was a contractor to ERM and she worked for him. The trial court then granted ERM's motion.

Plaintiff appealed and the Court of Appeals affirmed. The court held that "the evidence demonstrates that defendant expected to pay for plaintiff's services, while plaintiff's testimony reveals that she expected compensation in return for these services." Opinion p 4. Plaintiff did not receive a paycheck for her services, but under an arrangement with ERM, "her husband put her hours on his timesheet and got paid by defendant for those hours." *Id.* The Court of Appeals concluded that these facts satisfied the "contract of hire" requirement of MCL 418.161(1)(*l*). Plaintiff applied for leave and this Court granted leave on November 3, 2005, also inviting amicus curiae briefs from interested parties, including Michigan Defense Trial Counsel, Inc.

SUMMARY OF ARGUMENT

Current rule. Where a defendant in a civil case asserts as a defendant that the plaintiff was an employee and therefore subject to the exclusive remedy provision of the Worker Disability Compensation Act (WDCA), and the existence of the employment relationship is disputed, the trial court determines whether the facts are sufficient to support a finding that the employment relationship existed.

Proposed rule. The proposed rule is that the issue of the existence of an employment relationship must be determined solely by the Worker Compensation Agency and that the trial court lacks the power to determine its own jurisdiction.

Prior case law. There is no prior case law that supports the proposed rule. Cases have held that only the Agency can determine whether an injury occurred in the **course of employment** but no case has held that the threshold factual question of the existence of the employment relationship may not be determined by the court.

Constitution. The constitution of 1963 allows the legislature to limit the jurisdiction of the courts by legislative "prohibition," but the section of the WDCA that is alleged to divest the courts of jurisdiction on this issue contains no prohibitory language.

Revised Judicature Act. The RJA makes several changes in court jurisdiction, but uniformly uses the term "exclusive jurisdiction" when it confines jurisdiction to one court, thus denying it to another.

WDCA. The provision of the WDCA that is offered as support for the proposed rule that jurisdiction is prohibited to the courts and confided exclusively to the Agency contains neither the word "prohibited" nor the word "exclusive." The phrase, "all questions arising under this

act," is at most a grant of jurisdiction to the Agency in cases before it, but not a prohibition of jurisdiction to the courts in cases brought before them.

Context. The phrase "all questions arising under this act" can only refer to questions "concerning compensation or other benefits." If the phrase is read in the context of the constitution, it cannot support the adoption of the proposed rule because it does not express a "prohibition," as required by the constitution. If the phrase is read in the context of the section of the WDCA in which it appears, it cannot be given the broad interpretation claimed for it because that section is concerned only with small claims cases under the WDCA. If the phrase is read in the context of the sentence in which it appears, it cannot support the broad reading assigned to it because the beginning of the sentence, "[a]ny dispute or controversy concerning compensation or other benefits . . .," defines the scope of the phrase. MCL 418.841(1).

Policy and Practice. The proposed rule is incorrect because it would deprive a plaintiff of the guaranteed right to trial by jury on a factual basis of the civil claim. It is unwise because it would require that the Agency make determinations of the existence of the employment relationship in every case where that is raised, including cases where the claim is that an affiliated entity of the employer (*e.g.,* parent corporation, sister corporation, labor broker, or statutory employer) is also an employer for purpose of the exclusive remedy provision. The proposed rule is also unwise because it would lead to an unnecessarily expensive and cumbersome procedure by which every such issue must be referred to the Agency for decision and appellate review through the Agency and by leave to the courts, while the proceeding in the trial court is either dismissed or stayed. The resulting expense to the litigants and the State would impose an unacceptable burden on both litigants and the court system, for no corresponding benefit.

ARGUMENT

I. AT COMMON LAW, A TRIAL COURT IS EMPOWERED TO DETERMINE WHETHER THE FACTS ESTABLISH ITS JURISDICTION.

Standard of review. "Statutor y interpretation is a question of law that this Court reviews de novo." *Morales v Auto Owners Insurance Co,* 469 Mich 487, 490; 672 NW2d 849 (2003).

The issue presented in the order granting the application for leave goes to the fundamental aspects of the judicial process in Michigan, so the place to begin is with the courts and their authority as it existed before the adoption of the Worker Disability Compensation Act (WDCA). The question then becomes whether any constitutional or statutory provision makes a change in that pre-existing common law rule. The common law rule is easily stated.

> It must be admitted that the circuit court had power to decide upon its own jurisdiction, subject to review, of course, and to investigate such facts and in such mode as the attainment of the end called for.
> *Haywood v Johnson,* 41 Mich 598, 606; 2 NW 926 (1879).

In *Haywood*, the suit was on a promissory note, and was brought in St. Clair County. All of the parties were residents of Michigan but none was a resident of St. Clair County. Statutes in force at the time required a case to be tried in a county where a party resides. Under today's rules, this would be a venue issue, but at the time it was a matter of jurisdiction. The Supreme Court affirmed the dismissal. The statement quoted above appears as a simple statement of what was universally understood.

The principle that a court determines its own jurisdiction has remained unchanged and, until now, unchallenged. "[A] court at all times is required to question sua sponte its own jurisdiction." *Straus v Governor,* 459 Mich 526, 532; 592 NW2d 53 (1999). The necessary inference of course, is that in addition to asking the question, the court answers it.

II. NOTHING IN THE CONSTITUTION OR THE STATUTES CHANGES THE COMMON LAW AND DEPRIVES THE COURTS OF AUTHORITY TO DETERMINE THEIR JURISDICTION WHERE THE FACTUAL BASIS FOR JURISDICTION RELATES TO THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP.

Standard of review. The standard of review is as stated above.

The starting point for the analysis, therefore is that the circuit court has authority to determine its own jurisdiction unless something says otherwise.

A. The Constitution Grants Broad Jurisdiction to the Courts.

The constitution confirms the broad grant of jurisdiction to the civil courts, while allowing for limits on that jurisdiction by statute. Const 1963, art 6, sec 1 states:

> The circuit court shall have original jurisdiction in all matters not **prohibited** by law . . .
> (Emphasis added)

The Revised Judicature Act (RJA) reiterates the constitution's confirmation of a broad general grant of jurisdiction:

> The circuit court has the power and jurisdiction . . . possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state and the supreme court.
> MCL 600.601(1)(a)

B. Although the Legislature Is Constitutionally Permitted to Limit the Jurisdiction of the Courts, it Has Not Done so in the Revised Judicature Act.

The question then becomes whether the civil courts' jurisdiction has been "prohibited by law" in a way that deprives the civil courts of the authority that they have otherwise always had to determine whether the facts of a particular case confer jurisdiction upon the court.

Clearly there are places where the legislature has altered jurisdiction, prohibiting it to some courts by exclusive grants to others. Circuit courts are Michigan's courts of general

jurisdiction, but there are limits to that jurisdiction. The general statement of this principle is in the RJA:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where **exclusive** jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are **denied** jurisdiction by the constitution or statutes of this state.
> MCL 600.605 (emphasis added)

MCL 600.601(3) of the RJA contains two such prohibitions, one in favor of the probate courts and on for district courts:

> (a) The probate court shall have **exclusive** jurisdiction over trust and estate matters.
>
> (b) The district court shall have **exclusive** jurisdiction over small claims and civil infraction matters.

The legislature has also given exclusive jurisdiction to the court of claims in the RJA. MCL 600.6419 states that, with some exceptions, "the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be **exclusive**" (emphasis added).

The RJA also divides the jurisdiction of the district courts and the circuit courts based upon the amount in controversy.

> The district court has **exclusive** jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00.
> MCL 600.8301(1) (emphasis added)

C. The Legislature Has Not Limited the Jurisdiction of the Courts in the Worker Disability Compensation Act.

This background provides the context for an analysis of the argument put forth by the Worker Compensation Section of the State Bar as amicus curiae. It also defines the proposition more clearly. The proposition is this: The legislature exercised its constitutional authority to "prohibit" (the constitutional term) jurisdiction in the civil courts and confer "exclusive

jurisdiction" (the RJA's term) on the Worker Compensation Agency and chose to do so without ever using the term "prohibited" or "exclusive," and without saying anything at all in the RJA, but instead by a phrase in the second half of one sentence in one section of the WDCA.

The sentence that is said to work this dramatic change in the common law is this:

> (1) Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and **all questions arising under this act** shall be determined by the agency or a worker's compensation magistrate . . .
>
> MCL 418.841(1) (emphasis added)

These six words, it is suggested, do all the work. What the legislature did with great care and specificity in the RJA, apportioning jurisdiction among the various courts, it did as to all of the civil courts.

The WDCA has 9 chapters. Chapter 8, Procedure, has about 33 sections. One of those sections is MCL 418.841, which itself has 10 subsections. Subsections 2 through 10 refer to the small claims division. Subsection 1, quoted above, is said to stand apart, alone and above the remaining subsections, and from the entire topic of procedure (the legislature's title for chapter 8). Instead, the argument goes, this is where the legislature chose to do what it had always done in the RJA: define the jurisdiction of the civil courts, by granting "exclusive" jurisdiction to the Agency, thereby "prohibiting" it to the courts.

The justification offered for this result is the phrase itself. The phrase says "all questions arising under this act," and "all" is an expansive term, and "this act" obviously refers to the WDCA. This argument is wrong on three levels: first as a matter of statutory interpretation, second as matter of public policy and third as a matter of its practical application. As a matter of statutory interpretation, it requires that we ignore the constitution, the RJA, and even the very words in the phrase. As a matter of public policy, it is inconsistent with a fundamental principle of a common law system, which gives primacy to the courts. As a matter of practical

application, it guarantees a procedure that is at once cumbersome, expensive, and a almost certain to lead to disorder in the development of legal principles.

1. The Constitution Requires an Explicit "Prohibition" of Jurisdiction.

The six words do not appear in isolation. They are in a statute enacted under constitutional authority. The constitution confers a broad grant of judicial power upon the courts, and allows the legislature to limit that power by prohibitions. Const 1963, art 6, sec 1 states:

> The circuit court shall have original jurisdiction in all matters not prohibited by law . . .
> (Emphasis added)

The six words upon which the proposition rests contain no language of prohibition. The most that can be said for them is that they grant jurisdiction to the Agency. The phrase confers jurisdiction on the Agency to determine its jurisdiction, but does not deny it to the courts. The most that can be inferred from this phrase is that it allows each tribunal, the agency and the civil courts, to determine its own jurisdiction when that jurisdiction is called into question.

2. The Legislature Uses the Term "Exclusive" to Confer Exclusive Jurisdiction.

The same result follows from the language of the RJA. In the sections cited above, the RJA consistently uses the word "exclusive" when it intends that jurisdiction be exclusive. The RJA reflects a careful and detailed treatment of the allocation of jurisdiction.

3. The Argument Based on the Text of the Phrase Is Circular.

It is wrong as a matter of statutory interpretation to leave the constitution and the RJA out of the analysis where the issue is the jurisdiction of the judicial branch of government. But even if it were possible to do that, the result would be the same.

Even the phrase's placement in the WDCA (in one sentence of one section of one chapter of the WDCA) must be ignored as well. Its context within the WDCA demonstrates that it is what the legislature said it was – a procedural provision, not a substantive one.

But even if all of this is ignored, and the six words are set free from all of the principles that govern the interpretation of other statutes, and are read in complete isolation, the argument still fails. This is because the argument is circular.

The sentence fragment, again, reads:

> (1) Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and **all questions arising under this act** shall be determined by the agency or a worker's compensation magistrate . . .
>
> MCL 418.841(1) (emphasis added)

Obviously, the words "this act" refer to the WDCA, "this" being a relative adjective relating back to the antecedent act. The question is whether the exclusive remedy defense, raised in a civil court, is a question that arises "under" the WDCA.

"Under" is a preposition. As a preposition, it means "[s]ubject to the authority, rule or control of." *American Heritage Dictionary,* Third Edition, p 1945. A question is subject to the authority of the WDCA when and only when the WDCA applies. A question arises "under" the WDCA if the WDCA applies, and the WDCA applies if there is an employment relationship.

The WDCA applies if and only if there is an employment relationship. It does not apply if there is not. Finding the existence of an employment relationship is therefore antecedent to a finding that the WDCA applies. It is a threshold question. The argument that the issue whether an act applies is a question arising under the act is therefore circular.

This defect, it should be emphasized, exists even if we accept the premise that the constitutional requirement of a "prohibition" does not apply, or is somehow satisfied by a negative inference based upon the single word "all."

If the legislature had actually intended the result proposed, it knew how to do it. The RJA alone provides the template. To take just one of the examples quoted above from the RJA:

> The district court has **exclusive** jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00.
> MCL 600.8301(1) (emphasis added)

It is easy to follow that pattern and prohibit jurisdiction in the civil courts by a simple modifications to the WDCA. To start, the same word used in the RJA could be inserted:

> (1) Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and all questions arising under this act shall be determined [exclusively] by the agency or a worker's compensation magistrate . . .

This would at least solve part of the problem, though it does not address circularity. To resolve that, the legislature could have said, plainly:

> (1) Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and all questions arising under this act, [including the existence of an employment relationship], shall be determined [exclusively] by the agency or a worker's compensation magistrate . . .
> (Underline words added)

In short, the proposition requires, not the application of textual principles, but the abandonment of them. It does this by taking the word "all," inferring the opposite, and then exporting that opposite from a statute concerned with the Agency to the judicial branch. It also violates textualist principles by ignoring the inherent meaning of the word "under."

The principle of *ejusdem generis* provides guidance to the interpretation of the section. "The doctrine of *ejusdem generis* provides that, where a rule or law contains general words followed by the specific enumeration of particular persons or things, those general words are to be construed as applicable only to the same kinds of persons or things as those previously specifically enumerated." *SOCIA v DNR,* 176 Mich App 434, 441; 440 NW2d 649 (1989). In this case, of course, the specific words precede the general, but the logic still applies. The

subject of the sentence from which the phrase is extracted is stated clearly: "Any dispute or controversy concerning compensation or other benefits . . .." The following phrase "all questions" must be read in that context. It therefore refers to "all questions . . . concerning compensation or other benefits." These would include, for example, the determination whether an injury occurred in the course of employment, and the extent of the injury.

This sentence, read as a whole, is inconsistent with the proposed rule and consistent with the existing case law discussed in the next section, which holds that only the Agency can decide whether an injury is work-related. That question arises only if it is established that there was an employment relationship. The question whether an injury occurred in the course of employment is a question that arises "under this act" because it arises where there was an employment relationship.

D. The Case Law Does Not Support the Proposed Rule.

One more source of authority is offered in support of the proposed rule, and this is drawn from case law. Here, the argument is based principally upon two cases, *Szydlowski General Motors Corporation,* 397 Mich 356; 245 NW2d 26 (1976) and *Sewell v Clearing Machine Corporation,* 419 Mich 56; 347 NW2d 447 (1984). The argument here runs that *Szydlowski* defined the correct rule and *Sewell* fell from grace by changing it. *Szydlowski* is said to have applied the rule that the Agency had exclusive jurisdiction to decide the employment relationship and *Sewell* was wrongly decided when it departed from *Szydlowski.*

This argument, like the statutory argument, is mistaken. In *Szydlowski,* the worker had filed a claim in the Worker Compensation Bureau. The claim was twice dismissed for lack of progress. The worker then filed suit in the circuit court, alleging wrongful death from improper medical treatment provided by General Motors personnel, in violation of the statutory obligation

to provide reasonable medical services. The complaint alleged that the worker "was a GM employee who received injuries in the course of his employment." *Sewell* at 358. The Supreme Court held that "[t]he complaint concerned matters for the Workmen's Compensation Bureau not for the circuit court." *Id.*

Obviously, the existence of an employment relationship was not at issue in *Szydlowski.* Plaintiff alleged that he was an employee and no one disputed that fact. The issue was whether he could base a civil claim on a right that he – as an employee – claimed he had under the WDCA. *Szydlowski* did not hold that the existence of an employment relationship had to be determined by the Agency. It could not have so held, because that issue was never presented.

Unlike *Szydlowski, Sewell* squarely presented the issue now under attack, and this court addressed it squarely. In *Sewell*, the worker was injured in an industrial accident. He sued Armco Corporation in circuit court. Armco responded that it was his employer. The circuit court denied accelerated judgment and the worker appealed. The Court of Appeals, relying on *Szydlowski,* ruled that the issue of the worker's employment status should be referred to the Bureau, and the civil action should be held in abeyance pending a determination of the employment status by the Bureau. This Court reversed. It did not overrule *Szydlowski,* because there was nothing to overrule. Instead, this Court stated that the principle stated in *Szydlowski* was limited:

> Properly stated, the *Szydlowski* principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant.
> *Szydlowski* at 62

In the brief filed by the Worker Compensation Section, several cases are cited in support of the proposed rule. None of them supports the proposition.

In *Bednarski v General Motors Corporation,* 88 Mich App 482; 276 NW2d 624 (1979), the plaintiff alleged that her husband died from lung cancer. She sued her husband's employer; the employment relationship was not disputed. The Court of Appeals held that the issue whether the injury arose out of the admitted employment relationship belonged in the Agency.

In *Dixon v Sype,* 92 Mich App 144; 284 NW2d 514 (1979), the plaintiff, employed as a bus attendant in a school district, sued her fellow employee, the bus driver, for injuries she received while riding in the school bus. The employment relationship was not disputed. The Court of Appeals held that the issue whether the injury arose in the course of employment was to be determined by the Agency.

In *Buschbacher v Great Lakes Steel,* 114 Mich App 833; 319 NW2d 691 (1982), the plaintiff alleged that she was the employee of the defendant and sued for an alleged failure to advise her of a medical condition discovered in a medical examination. The Court of Appeals held that the Agency had jurisdiction to determine whether the injuries arose in the course of her employment.

In *Johnson v Arby's Inc,* 116 Mich App 425; 323 NW2d 427 (1982), the plaintiff sued his employer and fellow employee for injuries he received when he was stabbed at a company picnic. The Court of Appeals held that the trial court erred in deciding that the injury arose out of the employment relationship and that this issue must be determined by the Agency. The court noted that:

> The only exception to the Bureau's exclusive jurisdiction is where it is obvious that the cause of action is not based on the employer-employee relationship.
> *Johnson* at 430

In *Houghtaling v Chapman,* 119 Mich App 828; 327 NW2d 375 (1983), "plaintiff William Houghtaling ate two brownie cookies which contained marijuana while at his place of employment, an Oldsmobile plant in Lansing" (emphasis added). The Court of Appeals

reiterated that "the question of whether the act applies to a particular injury, i.e., whether an injury arose out of and in the course of a worker's employment (and is thus compensable under the act), is a question to be resolved in the first instance exclusively by the Bureau." *Id.* at 831.

All of these cases deal with the secondary issue (in point of analysis and time), which is whether the injury of an employee arose out of the employment relationship. Nothing in any of these cases holds that the judicial system lacks jurisdiction to determine the threshold issue whether the employment relationship applies. *Sewell* stands unchallenged.

E. The Courts and the Agency Each Have Jurisdiction in Cases Before Each of Them.

The argument for the proposition that a civil court cannot determine its own jurisdiction is convoluted both as a matter of statutory and constitutional interpretation, but the resolution of the jurisdictional issue is simple: When there is a civil suit for damages and the jurisdiction of the court is attacked, the court determines its own jurisdiction; when a worker applies for benefits in the Agency and the defendant claims it is not the employer, the Agency determines its jurisdiction.

Apart from the advantages that this has in terms of public policy and practicalities, discussed below, it also resolves the problems described above. It makes sense of the common law principle, the constitution, and the RJA provisions. It also resolves the circularity problem described above. When a person claims to be an employee and makes a claim for benefits under the act, then the existence of an employment relationship, as well as whether the injury was work-related, arises under the WDCA. But when a person who does not claim to be an employee brings a case for damages in the judicial system, the claim arises under common law. The existence of an employment relationship is not an element of the claim but a special defense

to it. The court determines whether that defense is supported by the facts, *i.e.,* the existence of an employment relationship. In doing so, it determines its own jurisdiction.

III. THE PROPOSED RULE RAISES SERIOUS PROBLEMS WITH PUBLIC POLICY AND WITH PRACTICAL APPLICATION.

Standard of review. The standard of review is as stated above.

As is explained above, the proposal is not for a return to an old rule but the creation of a new one. It is therefore worth a brief review of the results that would follow from adopting the new rule.

A. Depriving the Judicial Branch of Jurisdiction to Resolve the Factual Issue of the Employment Relationship Infringes on the Right of Trial by Jury.

The proposition that the judicial branch may not decide its own jurisdiction when the issue of an employment relationship is raised also creates problems with the constitutionally guaranteed right to trial by jury.

> The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.
> Const 1963, art 1 sec 14.

In *Reed v Yackell,* this Court recognized that the existence of an employment relationship was an issue of fact. It did so by remanding the case to the trial court for findings of fact, "on the existing record or after such evidentiary hearing as the court deems appropriate." 469 Mich 960; 671 NW2d 42 (2003). The existence of an employment relationship is a matter of fact, triable by right at a jury trial. In most cases the issue is resolved as a matter of law because the underlying facts are seldom disputed, but the right of jury trial applies nonetheless. In addition to its conflict with the constitutional definition of the jurisdiction of the courts and the express delineations of jurisdiction in the RJA, the proposed rule also conflict with this fundamental right.

B. The Proposed Rule Would Create Unnecessary Procedural Complexity.

If the proposition that only the Agency can decide whether an employment relationship exists is adopted, it must logically and inevitably apply in every factual context in which the issue arises in connection with a claim that the exclusive remedy protection applies.

1. The Propose Rule Would Require that All Disputes Over the Employment Relationship, Including Those Under the Economic Reality Doctrine, Be Referred to the Agency.

For example, when a defendant claims to be an employer for purposes of the economic reality doctrine, the issue must be referred to the Agency. The economic reality doctrine, with its "four-part test," has been replaced by the statutory definition, at least substantially if not wholly, in the factual situation presented by the *Reed* case, *i.e.,* where it is not disputed that the plaintiff worked for the defendant, but where the sufficiency of the work and compensation is disputed. *Hoste v Shanty Creek Management, Inc,* 459 Mich 561; 592 NW2d 360 (1999).

But the economic reality doctrine lives on in the situation presented by affiliated entities, and these situations take a wide range of forms.

One is the labor broker situation. "A labor broker-customer arrangement presents a unique employment relationship and adds a further dimension to the analysis of who is an employer for purposes of the WDCA. *Kidder v Miller-Davis Company*, 455 Mich 25, 35; 564 NW2d 872 (1997). "We stop short of holding that a labor broker-customer relationship will always establish dual employer status as a matter of law." *Kidder* at 40, note 7. Thus, this is a factual issue which must be referred to the Agency for resolution.

Another one is the parent-subsidiary relationship. *Wells v Firestone,* 421 Mich 641; 364 NW2d 670 (1984), *Verhaar v Consumers Power,* 179 Mich App 506; 446 NW2d 299 (1989), *Maki*

v Copper Range Co, 121 Mich App 518; 328 NW2d 430 (1982), leave denied 417 Mich 1031 and *Pettaway v McConaghy,* 367 Mich 651; 116 NW2d 789 (1962). Note that n these cases the decision depends on an analysis, not of the statutory definition, but of a variant of the four-part test, in which the focus is on the degree of integration between the acknowledged employer (the subsidiary) and the parent. For example, the factors that this Court considered in *Wells* included:

-- centralized accounting,
-- the deposit of money collections in the name of the parent,
-- the receipt of monthly profit and loss statements by local managers,
-- hiring and firing of local managers by the parent,
-- the adherence of local managers to regulations of the parent,
-- the central processing of tax forms,
-- the payment of wages from a central accounting office,
-- the central maintenance of personnel records.

Under the proposed rule, it would fall to the Bureau to analyze these factors.

Another category is sister corporation relationships. *James v Commercial Carriers,* 230 Mich App 533, 542; 583 NW2d 913 (1998). These too depend on an analysis of the relationship between the entities.

The question whether a defendant is a "statutory employer" under MCL 418.171, when the actual employer is a subcontractor that has no insurance would also be referred to the Agency.

There was even a premises liability case where the defendant owned the premises individually but employed the plaintiff through a corporation on the premises. *Bitar v Wakim,* 456 Mich 428; 572 NW2d 191 (1998).

All of these will need to be transferred to the Agency, which will then assume primary responsibility for developing this subcategory of jurisprudence. It will not suffice to argue that these cases are different because the facts they depend upon for resolution are not those articulated in the statutory definitions of employee and independent contractor. Obviously that response cannot apply to the "statutory employer" issue, but more broadly, if the phrase "all

questions arising under this act" is broad enough to include the interpretation of the statutory definition of employee, then it surely must be broad enough to include "all questions" the answers to which determine the availability of the WDCA's exclusive remedy provision.

2. The Proposed Rule Would Disrupt the Efficient Administration of Justice in the Courts.

There are also some practical problems with the proposed rule. Again, the premise is that the trial court lacks jurisdiction to resolve the issue. It follows that the issue cannot be presented to the court by a motion, either to dismiss or to remand to the Agency. A motion necessarily implies a power of decision, but the proposed rule holds that the courts lack that power. It is well-settled law that a court that lacks jurisdiction can enter only one order, to dismiss. "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Board of Regents,* 375 Mich 238, 242; 134 Mich 146 (1965). But even that rule applies when a court determines that it lacks jurisdiction, and the court cannot make that determination under the proposed rule, so some other procedure must be applied.

This Court could implement the new rule by means of a court rule providing for some procedure in the nature of removal, based upon the superior and exclusive jurisdiction of the Agency. A defendant could then file a document under a title such as "notice of dispute," and the rule could provide that the trial court must immediately dismiss or stay proceedings pending a resolution by the Agency.

It is worth noting that this procedure must apply equally in the appellate courts. The defense goes to subject matter jurisdiction, an issue which "may be raised at any time." MCR 2.116(D)(3); *Harris v Vernier,* 242 Mich App 306, 316; 617 NW2d 764 (2000). "Likewise, a

defense of lack of subject-matter jurisdiction cannot be waived by a litigant." *Id.* If a defendant advised the appellate court of the dispute over the employment relationship, then the Court of Appeals or this Court would be compelled to stay proceedings pending a decision by the Agency. If one level of Michigan's "one court of justice," const 1963, art 6, sec 1, loses this part of its jurisdiction, all levels must lose it. And they lose it to the peremptory power of the defendant.

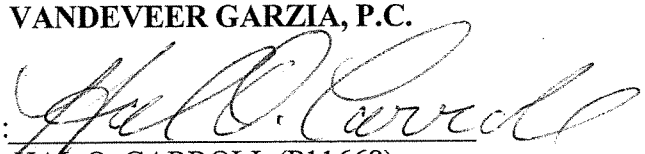
Viewed from the perspective of an individual defendant, this unilateral power may have some tactical advantages in a particular case, but viewed from the perspective of the orderly administration of justice, the insertion of a "sub-trial" at the early stages of a case is guaranteed to make litigation more expensive, more time-consuming, and more burdensome for all litigants, as well as for the Agency and the courts. The "sub-trial" in the Agency would lead to a decision that would have to be appealed within the Agency, then through the courts by leave, during all of which time the case in the trial court is stayed, or dismissed without prejudice.

RELIEF REQUESTED

Amicus Curiae Michigan Defense Trial Counsel, Inc. requests that this Court affirm that the trial court and the Court of Appeals had jurisdiction to determine the question whether Plaintiff was an employee.

Respectfully submitted,

VANDEVEER GARZIA, P.C.

By: 

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January 13, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

MARCIA VAN TIL,
Plaintiff-Appellant,

vs.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC.,
Defendant-Appellee,

No. 128283

Court of Appeals
No. 250539

Ottawa Circuit
No. 02-042717-NO

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

Janice Kinney states that on January 13, 2006 she served two copies of the Brief for Amicus Curiae Michigan Defense Trial Counsel, Inc upon:

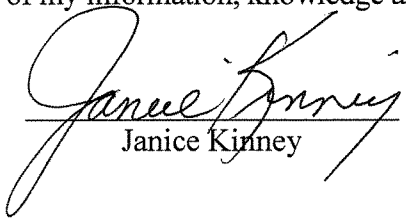
Thomas J. Wuori, Attorney for Plaintiff-Appellant, 136 E. Michigan Ave., Ste. 1050, Kalamazoo, MI 49007

John N. Cooper, II, Attorney for Defendant-Appellee Environmental Resources Management, Inc., 259 E. Michigan Ave, Suite 208, P.O. Box 50231, Kalamazoo, MI 49005-0231,

Martin L. Critchell, Counsel for Amicus Curiae Worker Compensation Law Section, State Bar of Michigan, 30700 Telegraph Road, Suite 2580, Bingham Farms, MI 48025

Steven A. Hicks, Counsel for Amicus Curiae Negligence Law Section, State Bar of Michigan, 3380 Pintetree Road, Lansing, MI 48911

by depositing it in a mail receptacle of the U.S. Postal Service, enclosed in a sealed envelope plainly addressed as indicated above, with postage thereon fully prepaid. I declare under penalty of perjury that the statements above are true to the best of my information, knowledge and belief.



Janice Kinney